



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA–2019–0002]

Notice of Issuance of Final Circular: Guidance on Joint Development

AGENCY: Federal Transit Administration (FTA), Transportation (DOT).

ACTION: Notice of availability of final circular.

SUMMARY: The Federal Transit Administration (FTA) has placed in the docket and on its Web site guidance in the form of FTA Circular 7050.1B, *FTA Guidance on Joint Development*. The purpose of the final Circular is to increase flexibility for project sponsors to pursue joint development projects, reduce FTA oversight of joint development agreements negotiated between project sponsors and their partners, streamline FTA’s project eligibility review process, and clarify prior guidance in FTA Circular 7050.1A.

DATES: The effective date of the Circular is [INSERT PUBLICATION DATE].

FOR FURTHER INFORMATION CONTACT: For policy guidance questions, Margaretta Veltri, Office of Budget and Policy, Federal Transit Administration, 1200 New Jersey Ave. SE, Room E52-315, Washington, DC 20590, phone: (202) 366-5094, or email, margaretta.veltri@dot.gov. For legal questions, Heather Ueyama, Office of Chief Counsel, 1200 New Jersey Ave. SE, Room E54-417, Washington, DC 20590, phone: (202) 366-7374, or email, heather.ueyama@dot.gov.

SUPPLEMENTARY INFORMATION:

Availability of Final Circular

This notice provides a summary of the final changes to the *FTA Guidance on Joint Development* Circular and responds to comments received on the proposed Circular. The final Circular itself is not included in this notice; instead, an electronic version may be found on FTA’s Web site, at www.transit.dot.gov, and in the docket, at www.regulations.gov. Paper copies of the final Circular may be obtained by contacting FTA’s Administrative Services Help Desk, at (202) 366–4865.

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I. Overview

FTA is finalizing its update to its Joint Development Circular to increase flexibility for project sponsors to pursue joint development projects, reduce FTA oversight of joint development agreements negotiated between project sponsors and their partners, streamline FTA’s project eligibility review process, and clarify prior guidance in FTA Circular 7050.1A. The final changes to the Circular affect: (1) the minimum threshold for the statutory “fair share of revenue” requirement; and (2) the submission and review process for FTA-assisted joint development projects. The final Circular also incorporates technical and conforming changes that increase clarity, conformity with existing law, and internal consistency.

This notice provides a summary of changes to Circular 7050.1A, and addresses comments received in response to the April 18, 2019 **Federal Register** notice of proposed updated circular and request for comments (84 FR 16339). The final Circular 7050.1B, *FTA Guidance on Joint Development*, is effective immediately and supersedes Circular 7050.1A. The final Circular applies to all new projects and those pending FTA approval at the time of the Circular's publication.

II. Changes to Circular 7050.1A

A. Fair Share of Revenue

Section 5302(3)(G)(iii) of title 49, United States Code, requires FTA-assisted joint development projects to provide a “fair share of revenue that will be used for public transportation.” Prior to the October 1, 2014 effective date of Circular 7050.1A, FTA generally deferred to a project sponsor's assessment of a “fair share of revenue,” and did not require any specific amount of revenue for transit from a joint development project. FTA defined “fair share of revenue” in Circular 7050.1A to incorporate a minimum revenue threshold that a joint development project must produce for transit purposes that at least equals the federal government's initial investment in the joint development project. (79 FR 50,728; 50,731–32).

Over time, FTA has found that defining a fair share of revenue minimum threshold unnecessarily limits the pool of potential projects by reducing flexibility for project sponsors and their partners to determine what amounts to a fair share of revenue. Accordingly, the proposed Circular eliminated the fair share of revenue minimum threshold and monetary requirement. FTA received several comments supporting this proposal. In response, the final Circular adopts this change.

FTA allows the amount and form of revenue received by the project sponsor to be negotiated between joint development parties. Consistent with the proposed Circular and Circular 7050.1A, the project sponsor must continue to report to FTA the amount and source of the revenue it will receive, and the revenue must be used for transit purposes. FTA advises in the final Circular that the project sponsor should determine how to document its reasonable determination that the terms and conditions of the joint development improvement (including the share of revenue for public transportation which shall be provided thereunder) are reasonable and fair to the recipient. For example, a project sponsor's Board of Directors (or similar governing body) could, following a reasonable investigation, document the fair share of revenue determination in a Board resolution or other Board materials. This change provides discretion to the project sponsor, while also ensuring compliance with the fair share of revenue requirement in lieu of the certificate of compliance and baseline market analysis that FTA no longer requires, as discussed in Section (B) below.

Further, in response to a comment, and to provide additional flexibility to the project sponsor, FTA will no longer reserve the right to decline joint development project funding or approval if the project does not generate revenue for the project sponsor.

B. Submission and Review Process

Circular 7050.1A prescribed a process by which project proposals are submitted to FTA for review. It required a formal project proposal to include: (1) a completed project request form that contains pertinent information about the joint development project, including how the eligibility criteria are to be satisfied; (2) all proposed agreements between the project sponsor and project partners; (3) an executed certificate of

compliance; and (4) two forms identifying other required and supplemental documentation, including a baseline market analysis to demonstrate a good faith effort to provide a fair share of revenue to the project sponsor.

FTA will update the project request form to reflect the changes regarding the “fair share of revenue” requirement described in Section (A) above. The revised project request form will be published on FTA’s website at www.transit.dot.gov/jointdevelopment.

FTA has determined that the elimination of the fair share of revenue minimum threshold makes the submission of a baseline market analysis and certificate of compliance unnecessary. Accordingly, the proposed Circular no longer required project sponsors to submit either document. In response to several comments expressing support for this proposal, the final Circular finalizes these changes. This will streamline the review of FTA-assisted joint development projects by reducing the amount of paperwork that project sponsors must prepare and FTA must review. In response to another comment, FTA encourages, but does not require, project sponsors to conduct baseline market analyses to better understand current market conditions and evaluate the viability of joint development projects.

C. Technical and Conforming Changes

The final Circular incorporates several minor edits for clarity and ease of reading. One commenter noted that certain defined terms were not included in the text of the document. FTA has reviewed all defined terms to ensure all are used in the final Circular. For example, FTA has removed “original federal investment” and “affordable housing” from the list of definitions in Chapter I. These definitions are unnecessary because all

joint development projects now are subject to the same statutory fair share of revenue requirements.

Supporting access to affordable housing is a long-standing goal of FTA's joint development program. In Circular 7050.1A, only certain community service projects, publicly operated projects, and affordable housing projects were exempt from the fair share of revenue minimum threshold requirement. In this final Circular, however, FTA no longer defines a minimum fair share of revenue threshold for any type of joint development project. Two commenters indicated that this change will increase flexibility for project sponsors to pursue a greater range of affordable housing projects.

The final Circular also no longer includes a definition of "incidental use" in Section IV.3.e, as the term is already defined in Chapter I. To the extent practicable, FTA has removed redundant references to FTA Circulars and replaced them with direct references to the underlying statutes and regulations on which the text of the Circular is based.

The distinction between joint development and public-private partnerships, as defined, was edited in Section II.1.c of the Circular for clarity and to conform with the definition of public-private partnership in 49 CFR 650.5.

FTA also updated the Environmental Requirements in Section V.3 of the Circular for clarity and accuracy, and added a reference to the underlying statute for NEPA re-evaluations (23 CFR 771.129). The Civil Rights sections (Sections V.5.b and V.6) were updated for clarity and accuracy as well, and to accurately reflect the nondiscrimination prohibitions listed in 49 U.S.C. § 53329(b).

The final Circular incorporates technical corrections for conformity with existing law. For example, 49 U.S.C. § 5302(3)(G)(i) requires that FTA-assisted joint development

projects either enhance economic development or incorporate private investment. In Section III.3.a.2 of the proposed Circular, FTA reserved the right to decline joint development project funding or approval if the level of private investment was not meaningful to promote an economic benefit. FTA has determined that this language conflates the statutory text, and clarifies that per § 5302(3)(G)(i), FTA requires a showing of either enhancing economic development or incorporating private investment – not both. Accordingly, FTA will no longer reserve the right to decline project funding or approval if the level of private investment is not meaningful to promote an economic benefit. Further, FTA clarified the use of the terms “program income” and “period of performance” when describing proceeds generated from joint development projects. “Program income” is defined as gross income “generated by a supported activity or earned as a result of the Federal award during the period of performance.” (2 CFR 200.80). “Period of performance” is defined as the duration of time designated within the initial grant. (2 CFR 200.77). FTA has determined that the term “program income” does not accurately describe proceeds derived from FTA-assisted joint development projects, as such projects often continue beyond the time designated within an initial grant. For clarity and accuracy, FTA has therefore revised the term “program income” to “revenue” in several places throughout the Circular.

FTA has also updated the final Circular to ensure internal consistency. Although FTA declines to provide a minimum threshold for both the statutory “fair share of revenue” and “fair share of costs” requirements, the Circular provided an inconsistent level of discretion to the project sponsor for each requirement. As discussed in Section (A) above, with respect to “fair share of revenue,” the final Circular eliminates FTA’s reservation of

the right to decline joint development project funding or approval if the project does not generate revenue. For consistency, FTA has eliminated a similar restriction with respect to the “fair share of costs” requirement – FTA will no longer reserve the right to decline joint development project funding or approval if a rental payment, or other means, is less than the actual cost to the project sponsor to operate and maintain the space in its facility. FTA made this change because this language unnecessarily inhibits a project sponsor’s flexibility when making a “fair share of costs” determination and is inconsistent with the level of discretion that FTA provides with respect to the “fair share of revenue” requirement.

FTA has also determined that the Circular provided inconsistent guidance on how a project sponsor should document compliance with certain statutory requirements. In response to comments regarding the “fair share of revenue” determination, the final Circular incorporates a recommendation that the project sponsor should determine how to document its reasonable determination that the terms and conditions of the joint development improvement (including the share of revenue for public transportation that shall be provided thereunder) are reasonable and fair to the recipient. For consistency, the final Circular incorporates similar recommendations with respect to the § 5302(3)(G)(i) “private investment” and § 5302(3)(G)(iv) “fair share of costs” determinations. Regarding “private investment,” the final Circular advises that a project sponsor should determine how to document its reasonable determination that the level of private investment is reasonable. Regarding “fair share of costs,” the final Circular advises that a project sponsor should determine how to document its reasonable determination that a rental payment, or other means, is reasonable and fair to the recipient. These changes

ensure a consistent level of flexibility and discretion to the project sponsor when documenting its compliance with each of these statutory requirements.

III. Response to Comments Received

Twelve parties submitted sixty-one comments in response to FTA's April 18, 2019 notice of Proposed Changes to the Joint Development Circular. As outlined in Section II, comments addressed: (A) Fair Share of Revenue, (B) Submission and Review Process, and (C) Technical and Conforming Changes, including general comments on the circular outside the scope of the proposed updates.

A. Fair Share of Revenue

In the Notice of Proposed Update to the Joint Development Circular, FTA invited comments on the proposal to no longer define a minimum revenue threshold. Section 5302(3)(G)(iii) of title 49, United States Code, requires FTA- assisted joint development projects to provide a "fair share of revenue that will be used for public transportation." Removing the minimum revenue threshold for the fair share of revenue requirement increases flexibility by allowing project sponsors to determine what constitutes a fair share of revenue in joint development projects. FTA will still require the project sponsor to report the expected amount of revenue it will receive, and its funding sources.

FTA received fifteen comments on the fair share of revenue requirement, most of which supported no longer defining a fair share of revenue minimum threshold. One commenter suggested FTA clarify that the removal of a minimum threshold should not be interpreted as a fair market value requirement by default. One comment sought specific clarification of the documentation that would be required to demonstrate a fair share of revenue meeting FTA's expectations.

Two commenters asked when to report on the expected revenue for a project, specifically: 1) whether the amount of revenue should be reported as part of the joint development application or later in the joint development process, and 2) if a determination of revenue is required in the joint development submission, whether this still functionally creates a minimum threshold. Another commenter sought clarification on how the proposed changes would affect joint development projects that advance community service or publicly operated projects, or affordable housing.

One commenter suggested FTA *not* retain the right to decline funding if a project does not generate revenue. Another commenter suggested FTA require the project sponsor's General Manager or Chief Executive Officer to certify that the terms and conditions of the joint development project are commercially reasonable and fair to the project sponsor.

FTA Response:

No longer defining a fair share of revenue minimum threshold is not new for FTA's joint development process. In 2007, FTA's guidance on joint development deferred to project sponsors and parties involved to determine what constitutes a fair share of revenue (72 FR 5788). The final updated Circular will no longer impose a fair share minimum threshold and defers to the project sponsors and parties involved to determine a fair share of revenue. In response to comments received, FTA has removed the provision reserving FTA's right to decline funding for joint development projects that do not generate revenue. FTA has declined to add clarification that the elimination of a minimum threshold should not be interpreted as a fair market value requirement by default, as this would be inconsistent with FTA's policy to not define "fair share of

revenue.” In response to comments on reporting requirements for expected revenue, FTA will continue to require the project sponsor to report the fair share of revenue and the sources of funding in the joint development application submitted to FTA. In response to comments regarding the documentation of a fair share of revenue determination, FTA has added a recommendation that the project sponsor should determine how to document its reasonable determination that the terms and conditions of the joint development improvement (including the share of revenue for public transportation that shall be provided thereunder) are reasonable and fair to the recipient. FTA has adopted similar recommendations with respect to the statutory “private investment” and “fair share of costs” requirements.

Since FTA will no longer define a fair share of revenue threshold, the proposed changes will now require all joint development projects to follow the same requirements regarding the fair share of revenue – including community service projects, publicly operated projects, and affordable housing.

In response to the suggestion that FTA require the project sponsor’s General Manager or Chief Executive Officer (CEO) to certify that the terms and conditions of the joint development project are commercially reasonable and fair to the project sponsor, FTA has removed this requirement. It will be at the discretion of the project sponsor and parties involved if they want the General Manager or CEO to certify the joint development project.

B. Submission and Review Process

FTA received seven comments on the proposed changes to the submission and review process. Most comments expressed support for the changes. Under the proposed changes,

FTA will no longer require project sponsors to submit a baseline market analysis or certificate of compliance. One commenter noted that a baseline market study may continue to be useful in providing an expected amount for the fair share of revenue; another commenter suggested updating the Certificate of Compliance requirement rather than eliminating it.

FTA Response:

FTA agrees that a baseline market study may continue to be useful in providing an expected amount for the fair share of revenue. While a baseline market analysis is no longer required for submission, project sponsors are still encouraged to conduct baseline market analyses to better understand current market conditions and evaluate the viability of joint development projects.

Eliminating the Certificate of Compliance requirement will streamline the review of FTA-assisted joint development projects by reducing the amount of paperwork that project sponsors must prepare and FTA must review. However, when requesting a formal FTA review of the proposed project, a project sponsor will still submit a completed Joint Development Project Request form and a proposed Joint Development Agreement, along with any supplemental documentation. FTA approval of a proposed joint development project will be contingent upon the project sponsor satisfying the eligibility criteria set forth in 49 U.S.C. § 5302(3)(G) and complying with the Uniform Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act), and the Uniform Administrative Requirements at 2 CFR parts 200 and 1201.

Project sponsors are also encouraged to submit joint development project proposals for preliminary FTA review, prior to determining the terms and conditions to be agreed upon by all parties in the joint development project.

C. Notice of Update to Joint Development Circular Generally

FTA received thirty-nine general comments, covering a wide range of topics, including: real property, the period of performance as it pertains to program income, and FTA policy. Several commenters requested clarification on the requirements and terminology in the Circular. Comments overall were receptive to the proposed changes.

Nine comments – including eight from transit agencies – were written in direct support of the proposed changes to the Circular. Sixteen comments addressed concerns or asked questions about real property; specifically regarding disposition, incidental use, and federal requirements on FTA-funded real property. Three comments sought clarification of the term “period of performance” under which FTA requirements attach. Eleven comments offered suggestions for clarifying language in the Circular generally. One of these comments suggested that in Section III.3.a of the Circular, FTA should consolidate the “enhances economic development” and “incorporates private investment” sub-elements into one element.

FTA Response:

FTA has included insights from several comments, and answered many of the questions received, in the final updates to the Circular. However, several comments addressed subjects outside the scope of the proposed changes. These comments were reviewed and will be useful in the development of FTA programs and guidance in the future.

Regarding real property, any joint development project that includes FTA funding or FTA-assisted property is an FTA-assisted joint development project and must comply with the requirements and procedures set forth in Circular 7050.1B. FTA-assisted property includes land previously acquired with FTA funds.

While joint development can be considered a form of transit-oriented development, it is usually much smaller in scope and always uses FTA-assisted project property or a direct investment of FTA grant funds. FTA assistance may not be used in the *construction* of transit-oriented development that is not eligible FTA-assisted joint development. However, FTA assistance may be used to *plan* transit-oriented development that is not eligible FTA-assisted joint development, in conjunction with transit projects.

Under the definition of program income, “period of performance” refers to the duration of time designated within the initial grant. In response to a comment requesting clarification regarding FTA’s use of the terms “program income” and “period of performance” when describing proceeds generated from joint development projects, FTA has revised “program income” to “revenue” in several places throughout the Circular. Suggestions to apply separate federal requirements to joint development projects using real property are outside the scope of this update. Terminology in this Circular has been updated only as it relates to substantive changes in policy related to the “fair share of revenue” requirement and the submission and review process for FTA-assisted joint development projects, as well as the technical and conforming changes discussed in Section (II.C) above.

FTA disagrees that the “enhances economic development” and “incorporates private investment” sub-elements should be consolidated in Section III.3.a of the Circular. Consolidating these two items would conflate the text of 49 U.S.C. § 5302(3)(G)(i), which requires either economic enhancement or private investment – not both.

K. Jane Williams,

Deputy Administrator.

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